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TO: Trustees of the Hawaii Employer-Union Health Benefits Trust Fund (EUTF)

FROM: Charles K. Y. Khim, Esq.

RE: Proposed EUTF Administrative Rules

As all of you will kindly recall, by a previous memorandum dated October 25, 2002, I informed all of you of some of my concerns regarding the proposed EUTF Administrative Rules. One of the items of concern I raised in my aforesaid memorandum was the fact that the proposed Administrative Rules intended to substantively change the scope of beneficiaries by adopting a definition of "part-time, temporary and seasonal or casual employee" that contravened the statutory definition of said category of employees set forth in Hawaii Revised Statutes (herein, "HRS"), Chapter 87A.

In my aforesaid memorandum, I stated that by changing the word "and" to "or" in said definition, the EUTF Board of Trustees will be contravening HRS, Chapter 87A by excluding a large class of part-time employees who are eligible for coverage under the statutory definition of "part-time, temporary, and seasonal or casual employee".

In support of my contention that an administrative agency, such as the EUTF, cannot promulgate administrative rules or take any other action which contravenes its enabling act or statute, hereinafter please find case authority from both the Hawaii Supreme Court, as well as the appellate courts from other states, which firmly hold that administrative agencies, such as the EUTF, violate the law by promulgating rules and regulations or taking other actions which contravene their enabling acts or statutes.

In Foytik v. Chandler, 88 Haw. 307, 966 P.2d 619 (1998), the Hawaii Supreme Court, in striking down an administrative rule of the State of Hawaii Department of Human Services as being contrary to the statute, the administrative rule was implementing, succinctly held that:

> "**It is axiomatic that an administrative rule cannot contradict or conflict with the statute it attempts to implement.** *Hyatt Corp. v. Honolulu Liquor Comm'n,* 69 Haw. 238, 241, 738 P.2d 1205, 1206-07 (1987) (quoting *Agsalud v. Blalack,* 67 Haw. 588, 591, 699 P.2d 17, 19 (1985); *see also State v. Feldhacker*, 76 Hawai`I 354, 356, 878 P.2d 169, 171 (1994). As stated previously, [t]he court shall declare [an agency rule] invalid if it finds that it violates constitutional or statutory provisions, or exceeds the statutory authority of the agency, or was adopted without compliance with statutory rulemaking procedures. HRS § 91-7(b). *See Hyatt Corp.* at 240, 738 P.2d at 1206 (providing that an agency rule is void and cannot be enforced if its adoption was not authorized by statute)." 966 P.2d at 631 (Emphasis added).

Moreover, in Topliss v. Planning Commission, 9. Haw.App. 377, 842 P.2d 648 (1993), the Hawaii Intermediate Court of Appeals held that the Plannning Commission's Rule 9-11 was void because it conflicted with HRS, §205A-26(2)(A) of its enabling Act. In so ruling, the Intermediate Court of Appeals stated that: "**Administrative rules may not enlarge, alter, or restrict the provisions of the statute being administered.**" 842 P.2d, at 657, fn. 11. In so holding, the Hawaii Intermediate Court of Appeals cited its decision in Jacober v. Sunn, 6 Haw.App. 160, 715 P.2d 813 (1986) as case authority.

A case to the same effect is Agsalud v. Blalack, 67 Haw. 588, 591, 699 P.2d 17, 19 (1985).

In Village of Westmont v. Lenihan, 704 N.E.2d 891 (Ill. App. 2 Dist. 1998), an Illinois Appellate Court, in enunciating the foregoing rule, stated as follows:

> "In closing, we acknowledge that courts are legitimately reluctant to enjoin the act of public officials (citation omitted). However, **the issuance of an injunction is proper to prevent public officials from taking actions that are outside the scope of their authority or unlawful.**" *Lindsey*, 127 Ill. App. 3d at 422, 82 Ill.Eec. 365, 468 N.E.2d 1019.

In further elucidating this doctrine, in an administrative hearing context, the Washington State Appellate Court in Inland Foundry v. Spokane County, 989 P.2d 102 (Wash. App. Div. 2 1999) stated that:

> "**A tribunal's lack of subject matter jurisdiction may be raised by a party or the court at any time in a legal proceeding.** RAP 2.5(a)(1); *Okanogan Wilderness League, Inc. v. Town of Twisp,* 133 Wash.2d 769, 788, 947 P.2d 732 (1997). Without subject matter jurisdiction, a court or administrative tribunal may do nothing other than enter an order of dismissal. *Crosby*, 137 Wash.2d at 301, 941 P.2d 701.
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> "***PCHB's Enabling Act.*** **An administrative review board has only the jurisdiction conferred by its authorizing statute.** *Okanogan Wilderness,* 133 Wash.2d at 788-89, 947 P.2d 732." 989 P.2d, at 103. (Emphasis added)

Moreover, in Subud of Woodstock, Inc. v. Town of Barnard, 732 A.2d 749 (Vt. 1999), the Vermont Supreme Court, in vacating a quasi-judicial administrative agency's decision as being void because it acted outside the scope of its statute, opined that:

> "It is well settled that '[p]ublic administrative bodies have only such adjudicatory jurisdiction as is conferred on them by statute, with nothing presumed in favor of their jurisdiction.' *Gloss v. Delaware & Hudson R.R.,* 135 Vt. 419, 422, 378 A.2d 507, 509 (1977)." 732 A.2d, at 750.

I am providing the foregoing case authorities to fully inform the EUTF Board of Trustees that their proposed administrative rule which dramatically changes the definition of

"part-time, temporary and seasonal or casual employee" is illegal because it contravenes the definition of that type of employee in the EUTF's enabling act, HRS, Chapter 87A. Therefore, the EUTF Board of Trustees cannot later claim that they were unaware that their action in promulgating an administrative rule that contravened their enabling act was an illegal action.

If any of you have any questions, please feel free to contact me.